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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 280

CAPITAL AIRLINES, INC., *Petitioner,*

v.

THE UNITED STATES.

REPLY BRIEF OF CAPITAL AIRLINES, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES H. MURCHISON,
WILLIAM A. CARTER,
Attorneys for Petitioner,
Capital Airlines, Inc.

STOCKTON, ULMER & MURCHISON,
1016 Ring Building,
Washington 6, D. C.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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There is nothing in the Government's argument on the question of jurisdiction which merits any reply. In our original brief we pointed out the reasons why the *Jones Case* is wholly inapplicable to the case at bar, and the Government's brief on that point amounts to no more than the bald statement that we are wrong without any stated reasons for that conclusion.

The only thing new in the Opposition Brief of the Government is the suggestion, under its Question 2, that the decision of the Court of Claims might be sustained upon the theory that Capital Airlines "voluntarily chose to operate under the Act", had an "option" whether it wished to apply

for a certificate, and that since the compelling of its services was the result of Capital's voluntary request, there was no taking for which just compensation must be paid. We submit that there is nothing in the allegations of the petition, and not one word in the Court of Claims opinion, on which to base this argument.

The case is here upon a demurrer and it is therefore admitted that Capital did not voluntarily elect to go into the air transportation business under the terms of the Act. Capital had been engaged in this business for over ten years when the Act was passed. Its only alternatives were to submit to the terms of the Act or to discontinue its business entirely. Capital's existing contracts for carrying the mail were cancelled without provision for any compensation for such cancellation. Its only alternatives were to carry the mail on the Government's terms and to perform the other required services on behalf of the Government, or to go out of business. The choice offered to Capital was thus a "Hobson's choice" between economic destruction and applying for an operating certificate.

The decisions of this Court establish beyond a doubt that Capital's application for a certificate under such circumstances was made under duress and that the assumption of the obligations of the certificate was not voluntary.

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the *characteristic* of duress properly so called."
>
> Holmes, J., in *Union Pac. R. Co.* v. *Public Service Comm.*, 248 U. S. 67.

Where the taxpayer's only alternatives were "to submit to an illegal exaction or discontinue its business", the payment of the tax was held to be under duress in the case of *Swift & Courtney & Beecher Mfg. Company* v. *U. S.*, 111 U. S. 22.

In the *Union Pacific Case,* 248 U. S. 67, the statutes of Missouri had a general prohibition against the issuance of railroad bonds without a certificate of authority from the Public Service Commission, and imposed severe penalties for such an issue. The Supreme Court of Missouri had held, as the Government argues here, that the application to the Commission for the certificate was voluntary, but this Court revised the holding, saying:

> "on the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. *The certificate was a commercial necessity* for the issue of the bonds."

This latter case was cited in *United States* v. *Bethlehem Steel Corporation,* 315 U. S. 289 at 300, as an example of the many in which the individual has been a victim of duress in dealings with government. It typified the helplessness on one side and overpowering strength on the other which is characteristic of duress.

So, in the case at bar, the certificate was a commercial necessity; the application for it and the acceptance of it were made under duress; and the taking of Capital's services and the use of its property under the terms of the certificate were as much within the protection of the Fifth Amendment as if the government requisition had been direct (as in *United States* v. *Russell,* 13 Wall. 623 and page 17 of our main brief) and without the intervention of any application for a certificate.

The petition for a Writ of Certiorari should be granted.

CHARLES H. MURCHISON,
WILLIAM A. CARTER,
Attorneys for Petitioner,
Capital Airlines, Inc.

STOCKTON, ULMER & MURCHISON,
1016 Ring Building, Washington 6, D. C.
Of Counsel.